

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JACQUELINE P. HAYES and
THOMAS MARK BLEST,

Plaintiffs,

V.

ALONZO EAVES, LIBERTY
MUTUAL GROUP, INC., LIBERTY
MUTUAL FIRE INSURANCE
COMPANY and LIBERTY MUTUAL
CAPTIVE HOLDINGS, INC.,

Defendants.

Submitted: March 5, 2012

Decided: June 22, 2012

ORDER

Upon Consideration of Defendant Eaves’ Motion to Dismiss

DENIED

John J. Sullivan, Jr., Esq., Morris Hardwick Schneider, Newark Delaware for Plaintiffs.

David L. Baumberger, Esq., Law Offices of Chrissinger & Baumberger, Wilmington,
Delaware for Defendants.

WITHAM, J.

SUMMARY

_____Alonzo Eaves (hereinafter “Defendant”) filed this motion to dismiss arguing that he is entitled to the dismissal of Jacqueline Hayes’s and Thomas Blest’s (collectively “Plaintiffs”) complaint because he did not receive service thereof. Defendant filed a responsive pleading without asserting insufficient service of process therein and without asserting insufficient service of process in a pre-answer motion. Under both Superior Court Civil Rules and Court of Common Pleas Civil Rules, a motion for insufficient service of process not filed with an answer or in a pre-answer motion is deemed waived.¹ Furthermore, Defendant received service after this Court granted Plaintiffs’ request for enlargement of time. Defendant’s motion to dismiss is **DENIED**.

FACTS

On December 26, 2010, a fire broke out in a garage on Defendant’s property. Allegedly, the fire spread to Plaintiffs’ property causing damage to a storage shed. Soon thereafter, Plaintiffs instituted this action in the Court of Common Pleas against Defendant, among others, seeking relief from that damage.² With the transfer of this action to the Superior Court on August 4, 2011, this Court’s task is to consider Defendant’s instant motion to dismiss for insufficient service of process.

Defendant represents that Plaintiffs filed their complaint on or about July 1,

¹See Super. Ct. Civ. R. 12(b), (g), (h); Ct. Com. Pl. Civ. R. 12(b), (g), (h).

²Plaintiffs’ insurers, Liberty Mutual Group, Inc., Liberty Mutual Fire Insurance Company, and Liberty Mutual Captive Holdings, Inc. are named as co-defendants in this suit. They are not joined in this motion.

Hayes v. Eaves, et al.
C.A. No: K11C-08-036 (WLW)
June 22, 2012

2011. The docket from the Court of Common Pleas indicates that the complaint was filed on June 15, 2011. In any event, service was effectuated upon Defendant Eaves's co-defendants on July 14, 2011, but service was returned *non est inventus* in regard to Defendant Eaves. Plaintiffs filed an alias praecipe and summons on July 24, 2011. On August 4, 2011, Defendant filed an answer to Plaintiffs' complaint. His answer asserted a series of defenses, none of which included insufficient service of process. The Court of Common Pleas issued the summons the following day. Believing that Defendant received service, Plaintiffs declined to forward the summons to the Sheriff for service.

After filing certain discovery requests, Defendant filed the instant motion to dismiss, arguing that he is entitled to dismissal due to Plaintiffs' failure to effectuate service upon him. Together with their response, Plaintiffs filed a motion for enlargement of time for service. On February 23, 2012, this Court granted that motion, and Defendant received service personally on May 23, 2012. _____

DISCUSSION

_____ Defendant argues that he is entitled to dismissal of the complaint because he did not receive service. Pursuant to Superior Court Civil Rule 4(j), and to its Court of Common Pleas counterpart, service must be effectuated upon a defendant within 120 days of filing the complaint. Failure to comply, in the absence of an extension by the Court, and in the absence of good cause, shall result in the dismissal of the action.

Pursuant to Superior Court Civil Rule 12(b), and, likewise, to its Court of Common Pleas counterpart, a defense for insufficient service of process may be

Hayes v. Eaves, et al.
C.A. No: K11C-08-036 (WLW)
June 22, 2012

asserted in either a responsive pleading or a pre-answer motion. In either Court, failure to raise insufficient service of process in a responsive pleading or pre-answer motion results in a waiver.³

Here, Defendant filed an answer in the Court of Common Pleas. Defendant failed to raise an affirmative defense for insufficient service of process in that pleading. Defendant failed to file a pre-answer motion asserting the same. As a result, Defendant may not raise the defense now because it is deemed to have been waived.

Furthermore, on February 23, 2012, this Court granted Plaintiffs' request for an enlargement of time to effectuate service. Plaintiffs effectuated service upon Defendant personally on May 23, 2012. Having received service in accordance with that Order, Eaves cannot show that service was lacking.

CONCLUSION

Defendant Eaves's motion to dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/sal
cc: Opinion Distribution

³See Super. Ct. Civ. R. 12(b), (g), (h); Ct. Com. Pl. Civ. R. 12(b), (g), (h).